



Information Brief

Privately Operated Speculative Prisons and Public Safety

A Discussion of Issues

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Prisons and Public Safety**
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Office of Justice Programs
United States Department of Justice**

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Introduction

Attracted by the promise of hundreds of new jobs, a small, economically depressed town agrees to be the site of a 1,500-man prison operated by a private, for-profit company. The company markets its prison beds to departments of corrections across the country and enters into contracts to house inmates from four states. No inmate in the prison comes from the state in which it is located. The department of corrections in the host-state plays no role in the prison's siting or construction, nor does the department or any other agency in the state exercise any oversight powers over it. This is an example of a "speculative," or "spec," prison.

The Violent Offender Incarceration and Truth-in-Sentencing (VOI/TIS) Incentive Grant Program authorized by the Violent Crime Control and Law Enforcement Act of 1994, as amended, allows states to use grant funds for prison and jail construction to expand or free up space for Part I violent offenders. The legislation also authorizes states to use grant funds for privatization, which is defined as private-sector management and operation of a correctional facility that is owned by the state, leasing of beds from a private entity, or the construction of a state correctional facility by a private entity for the purpose of increasing or freeing existing bed space for Part I violent offenders. The VOI/TIS Program is administered by the Office of Justice Programs' Corrections Program Office (OJP/CPO) in the U.S. Department of Justice.

OJP/CPO does not have a position either for or against privatization, but is committed to facilitating informed decisions about the use of private prisons. OJP/CPO has initiated a number of conferences, workshops, and publications to help public policymakers make informed decisions related to sentencing and corrections, including issues related to privatization. In response to a need expressed by a number of state officials to share information and experiences related to the growing number of private, speculative prisons, OJP/CPO sponsored a Forum on Privately Operated Speculative Correctional Facilities and Public Safety in Atlanta, Georgia, in March 1999. Attendees included directors of corrections, correctional legal counsel, legislators, and representatives from local communities who have experience with speculative prisons as the host site or as an agency sending inmates to a private facility in another jurisdiction. Private vendors were not invited to the forum.

The forum consisted of a series of general sessions and moderated breakout sessions in which the group identified and discussed issues related to speculative prisons. To facilitate open discussion, participants were told that the issues discussed would be documented but that neither the participant nor the state would be identified. An exception was made for the experience related to the Youngstown, Ohio, facility which had been documented in a published report and was used as a case study at the forum. Approaches used by various states to address specific issues, such as monitoring, were described and identified to implementing states. This information brief summarizes the discussions from the forum and is intended to serve as a guide to public policymakers on issues to be considered when dealing with spec prisons. Issues and concerns identified through other sources provide context to this report and are reference in footnotes when they occur.

The Issues section of this document presents the discussions in three categories: local community issues; host-state issues; and sending-state issues. For many issues, there was insufficient experience for participants to provide recommendations for the best way to address them. However, for the public policymaker who is considering entering into a relationship with a private entity to build a spec prison, send inmates to a spec prison, or who is faced with a private entity's plans to build a spec prison in his or her state, just being aware of some of the issues faced by other states or communities can be beneficial. Where possible, examples of how the forum participants addressed specific issues are included in the document.

Privatization and American Corrections

The practice of public corrections agencies contracting with private, for-profit corporations to house substantial numbers of inmates is relatively new. Privatization burst onto the corrections scene in the mid-1980s. Corrections Corporation of America, the first private company to enter the field, was incorporated in January 1983.¹ A survey conducted in early 1984 showed that no contracts existed for the operation of major adult prisons or jails, although one state was contracting with a private foundation to run a juvenile training camp and one city was contracting with a private for-profit company to operate its juvenile facility.²

There was substantial opposition to the concept of privatization from public sector correctional leaders and line correctional staff when the idea first surfaced in the mid-1980s. Despite the opposition, the concept of privatization has grown to become a fixture in American corrections. On January 1, 1999, there were more than 116,500 private correctional beds in nearly 160 facilities under private operation across the country. This number includes traditional prisons and jails, detention facilities for persons held under the authority of the Immigration and Naturalization Service, as well as facilities for juvenile offenders.³ Just 1 year earlier, there were 91 active contracts with 84 privately operated facilities and with, perhaps, 50,000 prison inmates held in private facilities, according to a survey of state (including Puerto Rico and the Virgin Islands) and federal prison systems.⁴

¹ *The Privatization of Corrections*, Joan Mullen et al., National Institute of Justice, February, 1983.

² Id. For many years before the "privatization" movement began, many states contracted with private entities, often nonprofit organizations, for operation of halfway houses, work-release facilities, and the like. This historic contracting, usually for a relatively small number of beds, is not in line with the concept of privatization as the term is used in this monograph.

³ Private Corrections Project, Center for Studies in Criminology and Law, University of Florida (PCP), <http://web.crim.ufl.edu/pcp/census/1998>.

⁴ *Private Prisons in the United States - An Assessment of Current Practice*, Abt Associates, McDonald et al., 1998, p. iii. The uncertainty regarding the number is due to the fact that some inmates were transferred to a private facility via an intergovernmental agreement between the sending agency and another unit of government, which, in turn, contracted with a private firm for operation of a prison facility. Some others were held in nonsecure private facilities, such as work-release centers. Hereafter, "Abt".

Early in the privatization movement in corrections, generally a state entered into an agreement with a private company to operate a prison within the state for state inmates. Contracts involving the large-scale movement of inmates across state lines were not generally envisioned at this early stage. In one instance, a private company proposed a specialty prison to house inmates from many states who were in protective custody, but for various reasons, this project foundered.⁵

What Are Speculative Prisons?

In more recent years, a secondary privatization model has evolved. This new speculative prison model was the focus of the forum. The speculative prison might be referred to as a “Field of Dreams” approach (i.e., “if you build it, they will come”). The speculative prison model has some or all of the following characteristics:

- # The prison is operated by a private entity. Sometimes it is owned by a unit of government, generally a county or municipality, which may not house any inmates in the facility but contracts with the private company to build and operate the prison as a source of revenue and jobs for the local community.
- # The prison is developed on a speculative basis (i.e., without a contract with any agency or agencies for the housing of inmates). Alternatively, a private prison may begin with a contract with one state but later market open beds to other states as it expands and/or loses the original contract.
- # Often, but not always, the private prison is located in a state other than that in which the majority of inmates reside.
- # Prison inmates may come from several different states.
- # The prison may be attracted to the location by economic development efforts of a local unit of government seeking to expand employment opportunities.

Inmates held in speculative prisons are generally classified as medium custody. This large group of inmates is generally easier to manage than inmates in higher security levels and does not have the direct community access that minimum-custody inmates might. To date, the spec prison movement does not offer housing for special categories of inmates (protective custody, geriatric, sex offenders, etc.), although one company is looking at geriatric institutions.

In a typical spec prison arrangement, a private prison company and a local unit of government in search of economic growth agree to build a prison, perhaps with a stipulation that many of the new employees will be hired from the local area. The prison company then offers prison beds to other jurisdictions in need of additional bed space, regardless of their distance from the new facility. These new beds are attractive to a state with prison crowding problems because they are available

⁵ *The Privatization of Corrections*, Joan Mullen, et al., National Institute of Justice, February, 1983, p. 61.

immediately and with no initial capital investment or siting controversies. The private company enters into contracts with one or more states to house their inmates and eventually the inmates are transferred across state lines to the new prison.

Speculative Prisons: A Case Study

One example of a speculative prison where there were numerous problems is the Northeast Ohio Correctional Center in Youngstown, Ohio, operated by a private prison company (the company) with inmates from the District of Columbia.

A Report to the Attorney General: Inspection and Review of the Northeast Ohio Correctional Center, prepared by the Office of the Corrections Trustee for the District of Columbia, identifies failures in security and operational management due to seriously flawed decisions by leaders of both the company and the D.C. Department of Corrections. Moreover, the Youngstown community encountered serious problems that were difficult to address absent a strong contract with the company and more intensive monitoring of prison operations.

The company and Youngstown entered into a contract by which the company would build a large, medium-custody prison in Youngstown, even though initially, the company had no contractual source of inmates for the prison. A few months after construction began on the Northeast Ohio Correctional Center, the company began negotiations with the District of Columbia to house D.C. inmates. Feeling obligated legally and operationally to remove inmates from its existing facilities, the D.C. Department of Corrections signed a short-term contract with the company to house 900 inmates. Per the company's agreement with Youngstown, the company's contract with the District of Columbia stipulated housing for medium-security inmates only.

The District of Columbia was anxious to enter into the agreement to remedy its operational emergency of a large number of high-security inmates being housed in fairly low-security dormitory-style facilities. Contrary to sound correctional practice for opening a new prison, 900 inmates were transferred from the District to Youngstown in only three weeks. Standard correctional practice is to gradually bring inmates into a new facility. Despite the contractual provisions for medium-security inmates, the District sent a substantial number of inmates who were, or should have been, classified as high security. The company did not object to receiving these inmates.

Inmates disrupted the facility almost immediately. Within about two weeks of the first inmates arriving, there were a couple of serious disturbances; within one month, there had been several stabbings, including the stabbing of an officer. Despite these problems, the original short-term contract was replaced with a long-term agreement between the company and the District. By October 1997, barely six months after its opening, the Youngstown facility housed 1,700 inmates. Disturbances continued and two inmates were murdered in February and March 1998. In July 1998, six inmates serving long sentences for serious, violent offenses escaped. All were eventually captured.

The facility was new with a brand new, inexperienced staff and very inexperienced supervisors. Some of the most fundamental things were not happening, whether it was entrance procedures, control of

contraband, movement of inmates, segregation, or inmate shakedowns. Some equipment items, such as food and laundry carts, were not up to standard and were quickly harvested for weapons.

Officials from the D.C. Department of Corrections did not know the extent of the problems that were occurring, because they did not have any onsite capacity to monitor the facility and did not send monitors to the facility.

Not surprisingly, a civil rights lawsuit was filed on behalf of the inmates. The resulting settlement required various remedial steps and the company had to pay more than \$1.6 million to settle the monetary claims. The report details the mistakes made by the District of Columbia and the company. It also describes some of the problems a local community, unfamiliar with prison operations but eager for new jobs, may face when it does not retain some level of oversight over a new prison.

Issues Related to Speculative Prisons

The forum participants discussed a broad range of issues related to speculative prisons. While the Youngstown situation may not represent the typical speculative prison contract, discussions during the forum indicate that some of the problems the report chronicles have occurred elsewhere, albeit without the same tragic consequences. For instance, one participant talked about the problems with the rapid transfer of a large number of inmates into a new prison without adequate planning. The resulting inmate disturbance was quelled by state department of corrections employees.

Other host-state participants expressed concerns about not knowing what was occurring in private prisons in their own backyards. Some state leaders who had sent inmates to private prisons in other states spoke of difficulties in monitoring those prisons. Several forum participants expressed concerns about such fundamental questions as whether staff in a private prison had adequate legal authority to use force (including lethal force) against inmates and whether host-state laws would cover crimes in a private prison, such as escape, assault on a correctional officer, or possession of contraband.

Several forum participants expressed concern that public policy regarding private prisons may be unduly influenced by corporate lobbyists due to the fact that public officials are limited in their ability to lobby the legislature, whereas private companies may dedicate staff resources to this purpose. One state cited an example in which state legislators interested in passing a law related to private prisons went to the private operator rather than the department of corrections for advice on what the bill should contain. Forum participants caution public officials to be careful in responding to these lobbying efforts and not to run afoul of state conflict of interest and ethics laws or to compromise the interests of the public in establishing public policy.

The lessons from Youngstown and from other jurisdictions experienced with private speculative prisons relate to planning, preparation, and execution. The growth of private prisons may have

outstripped the development of necessary regulation and monitoring by government agencies in states where such prisons are located and/or states that are sending inmates to those prisons.

The forum and this information brief were designed to help inform government leaders about the issues associated with private prison expansion so they may develop well-informed, reasonable policies. The issues identified by forum participants are presented in three sections: local community issues, host-state issues, and sending-state issues. Some of the issues relate to any privatization arrangement (e.g., developing a request for proposals, contracts, monitoring, etc.). Some of the issues, such as those relating to regulatory oversight and monitoring, are common to the local community, the host-state, and the sending-state, although each has a different interest.

Local Community Issues

The comments from the participants representing local communities regarding their experience with private prisons were generally favorable—Youngstown being the notable exception. They noted the economic benefits a private prison employing several hundred persons can bring to a small, economically depressed community, but several did not have experience with operational issues since the facilities being built had not yet opened.

Many of the issues and questions around bringing a large prison into a small community are the same as would arise when any large employer moves into a small community. What will the impact be on the infrastructure (roads, schools, water, solid waste, and sewage)? What portion of this impact will the private business pay for? What property or business taxes or other costs should local government forgive? What other economic inducements should be offered for the private prison to locate in the community?

However, unlike a new factory or computer plant, the private prison brings with it a unique set of security and community protection issues. A new mill or factory may increase crime slightly, but mill workers will not riot, take their supervisors hostage, or escape into the community. The private prison's impact on the local justice system (both criminal and civil) will undoubtedly be much larger than that of any other new employer. The following is a summary of the local issues raised by forum participants.

Economic Benefits

Based on discussions during the forum, the economic impact of a prison on a small, economically depressed community can be dramatic. In addition to providing short-term construction jobs, the prison creates hundreds of jobs in a relatively environmentally friendly worksite. Forum participants noted that the private sector can plan, build, and open a new prison more rapidly than the public sector, improving the local economy sooner. Additionally, a state department of corrections may not need a new prison or want to locate it in a small community a long distance from its other facilities and centralized services.

The influx of new prison workers will be the economic catalyst for other new service businesses (stores, restaurants, etc.). The new privately operated prison may pay substantial taxes and user fees for municipal services (water, sewage, waste, etc.), although the amount of revenue may depend on the nature of the agreement between the prison and the community. One participant said his city's budget increased substantially, while the tax rates dropped because of the presence of the private prison.

Participants spoke of companies willing to pay the costs of upgrading the infrastructure to accommodate the demands of the prison. Given the economic growth a prison can offer, it is no wonder that local governments may offer a variety of financial inducements for the private company to locate in its area, including the sale of publicly owned land to the private company at a deep discount.

The private prison business has not been around long enough to know whether its economic benefits are durable. Will private prison contracts dry up and speculative prisons close their doors? So far, this has not happened and the number of inmates under correctional supervision continues to grow. There were nearly 50,000 more inmates in state prisons on June 30, 1998 than the prior year—an increase of 4.4 percent. However, the rate of growth of prison inmates slowed slightly during the same time period.⁶

Costs to the Local Community

The private prison can provide a substantial economic boost to a local community, with hundreds of new jobs and infrastructure improvements. However, there are also costs to the local government. Perhaps the greatest cost to host jurisdictions comes from criminal prosecutions of inmates for crimes committed inside the private prison. These costs can be substantial. Consider the costs of a complex murder/death penalty trial with appeals or the cost of multiple inmate prosecutions following a major riot.

Several participants urged that the private prison be required to reimburse local governments for the costs of prosecuting crimes committed by out-of-state inmates. Ohio enacted legislation that mandates the private prison contractor to reimburse a local jurisdiction for any costs the jurisdiction

⁶ *Prison and Jail Inmates at Midyear 1998*, Bureau of Justice Statistics Bulletin, March 1999.

may incur in the investigation or prosecution of an offense committed by an out-of-state prisoner⁷. One participant from a city that hosts a private prison noted that inmate-initiated civil lawsuits place another cost burden on a local jurisdiction's justice system.

Impact on Local Government Services

In addition to impacts directly associated with the prison (such as new demands on the local criminal justice system), what impact will a new facility have on essential community services, such as schools roads, sewers, and solid waste disposal? Several participants spoke favorably about the private companies' willingness to pay for many of the infrastructure improvements related to the new institution.

Negotiating Contracts

Local governments are not likely to have much experience with the operation of a major prison or in dealing with private prison companies. For this reason, several participants suggested that local governments obtain guidance from the state department of corrections or hire a consultant familiar with prison issues when negotiating with a private prison. Outside assistance may also be beneficial when dealing with the corporate aspect of private prisons and with the economic development package.

Regulation of the Private Prison

The Youngstown incident illustrates the need for local governments to take a strong interest in overseeing the operation of a private prison in their community. A local community has much more at stake when it accepts a 1,500-bed prison than, for example, a computer parts factory. Computer factories do not raise any public safety issues, while a 1,500-bed prison raises many. For instance, will the local government attempt to control or limit the type of inmates entering the facility? Will the department of corrections be included in regulatory efforts? Will the local government be involved in monitoring the prison to ensure that it is operating properly and that security is adequate by overseeing both internal and perimeter security? Will numbers and qualifications of staff or staff deployment be examined?

If the local community plans to regulate or monitor the prison and/or the types of inmates who are admitted to the facility, does it have the expertise to perform this function? More importantly, will a small community have the political muscle to effectively regulate a large private prison, given that it may be the largest single employer in the community and its employees may be voters or even members of the city council?

⁷ Ohio Revised Code §009.07.(G)(2). This is a section in a comprehensive bill passed by the Ohio legislature in the wake of Youngstown. It imposes a strong regulatory regime on private prisons housing out-of-state prisoners. The text of the bill appears as Appendix A to this document.

The regulatory climate is a factor that strongly influences a private company's decision to locate in a given community. If the prison faces aggressive regulation from the local or state regulatory agency, is the company likely to look elsewhere for a site?

Local Law Enforcement and Emergency Services

Inevitably local law enforcement officials will become involved with the private prison. They will be called upon in the event of an escape. They will be expected to investigate allegations of criminal activity by inmates. They may also be called upon to help in the event of a disturbance. Local fire or other emergency service authorities may also be drawn into prison emergencies.

What relations need to exist between the prison and local law enforcement, fire, and emergency medical authorities? What agreements for cooperation should be entered into and should the private company be required to reimburse local jurisdictions for these services? Will a small local law enforcement agency be staffed adequately or trained sufficiently to help in a meaningful way in the event of a major inmate disturbance? What additional training should its staff receive if "responding to a prison disturbance" becomes part of the job description for its law enforcement officers?

Host-State Issues

Issues raised by forum representatives from states with private, speculative prisons that house inmates from other states centered on issues of public safety and the role that the host-state should play in oversight or regulation of the facility. In some cases, the host-state sends inmates to the spec prison within its borders and will also need to address issues presented in the section on sending-state issues.

Restrictions on Siting Private Prisons

In most states there are no restrictions on where a private company can locate a new prison. Special enabling legislation is not necessary to site a privately operated prison, assuming the business complies with local zoning restrictions. In this respect, the private prison is similar to virtually any other business. Currently, most states do not regulate private prisons. One of the major issues raised by the forum was the extent to which states should attempt to regulate such prisons, especially ones not housing in-state inmates and, thus, not subject to oversight by any state-level agency with correctional expertise.

Zoning restrictions are one thing, but inmate rights are another. At least one lawyer at the forum questioned whether holding an inmate in a private facility away from the state where he was convicted amounts to false imprisonment. And, if yes, was enabling legislation required? Assuming the sending-state can delegate its powers to imprison an inmate to a corporation operating within its

borders⁸, would that delegation of authority extend across state lines?

Can a state ban private prisons, consistent with the Interstate Commerce Clause? Forum participants disagreed as to whether movement of inmates across state lines from a state prison system to a private prison contractor constituted “interstatecommerce.” If it does, then a ban on such movement by a state legislature probably would be found unconstitutional. This issue must ultimately be resolved by the courts. Legislatures contemplating an outright ban on speculative prisons within their borders should consider this issue carefully before acting.

Forum participants generally agreed that if the Commerce Clause did apply to this type of inmate movement, a host-state could regulate the private prison business within its borders. However, it would not compel a state to enter into a contract with a private prison company.

State Regulation of Private Prisons

There was a consensus among forum participants that regulation of some form was both constitutional and appropriate. The most compelling reason is to assure that the operation of the private prison does not threaten public safety. The issue of public safety is particularly sensitive when the facility is housing inmates from out of state. In these cases, the host-state and the local jurisdiction in which the facility is located need to be concerned about public safety issues (escapes, inmate disturbances, fires, natural disasters, work stoppages, or other labor disputes that may threaten the prison.)

A state may also be interested in regulating the location of private prisons, since its own state department of corrections may become a customer of the prison in the future. A host-state/local jurisdiction may wish to assume some level of responsibility for inmate safety and other operational issues, but the sending jurisdiction(s) has a greater stake in inmate safety. Key state regulation issues include:

Should regulation be mandatory or discretionary?

Should the oversight of private prisons by one or more agencies in a host-state be discretionary or mandatory? Authorizing, but not mandating, an agency to monitor a private prison may not produce thorough, ongoing monitoring unless moneys are appropriated to fund the task. Mandatory regulation imposed on an agency without funding will be half-hearted. Legislation that addresses the question of host-state monitoring should consider the “may” versus “shall” issue.

The Oklahoma Legislature passed a law before any private prisons were built in the state that requires the Oklahoma Department of Corrections (ODOC) to inspect a private prison before it begins operation and authorize it to commence operations. The ODOC is also required to

⁸ It appears to be generally conceded that such delegation of authority is acceptable. Abt, App. 3, p. 4.

conduct an annual review. In several other states, the department of corrections has no oversight responsibilities but may provide some guidance or technical assistance to private facilities.

Should the department of corrections be the regulator?

If state agency-level regulation is required (regulation by local government is discussed earlier in this brief), what agency should serve this function? The department of corrections is the most obvious choice because it is the in-state expert. Some forum participants from departments of corrections noted that if problems arise within a private prison, the state department of corrections will be involved automatically in the mind of the media and public, with or without local inmates in the prison and with or without oversight responsibility. Moreover, a department of corrections, or other state-level regulatory body, is less subject to the economic and political dilemmas a small community might face in regulating a private prison.

While many forum participants agreed that the department of corrections should be the regulatory agency, some department directors were not enthusiastic about being given such responsibilities. Departments of corrections are not, historically, regulatory agencies. Regulating private prisons may create political problems for the regulatory agency, either from the private operator or the local community, which fears the actual or potential loss of a large employer in the area. Political repercussions from tough regulatory decisions could affect a department's ability to carry out its larger mission of providing care and custody for inmates under its control.

Some participants raised questions about a department of corrections imposing standards on a private prison that it may not enforce in its own facilities. If a state agency other than corrections becomes the regulating agency, one participant wondered how long before it would extend its regulatory power to the state's own prisons.

Who should pay for the oversight?

Assuming a host-state or local governmental entity implements regulatory control, who should pay for it? If the private corporation pays, how much should they pay? Colorado indicated that its monitoring office has a staff of 10, which is based on a rate of 1 staff member per 250 inmates. To date, the costs have been paid from the state general fund. However, the state is considering legislation that would impose a per diem charge on the private provider for every private inmate held in the state (regardless of where the inmate comes from) to pay the monitoring expenses.

A per diem assessment might pay for routine regulatory oversight, but would it cover an emergency requiring deployment of many officers? Some suggested that the state should have the power to send the corporation a bill for its services. If states adopt this "send a bill" model, would the private facility hesitate in calling for emergency assistance?

What aspects of a private prison could/should be regulated?

What should be regulated depends on a state's goals. The most obvious goal for a host-state is public protection and the safety and welfare of the inmates and staff. Government regulation can range from mild to draconian. Several participants urged restraint for fear that the added costs of regulation would outweigh the economic incentives for such businesses. A state wishing to discourage private prisons could adopt a very vigorous, demanding regulatory scheme.

In considering how the operation of a private prison should be regulated, policymakers may wish to consider how they would regulate other new industries (e.g., the quality and quantity of employee training). What makes the private prison "special?" The answer in many cases may be the potential threat to public safety.

Any sort of control over the private prison by the host-state must begin with appropriate enabling legislation that defines the areas to be regulated with whatever degree of detail it wishes. Absent this enabling legislation, the state may have very limited powers regarding the operation of a private business. Existing laws may give a state or local governing body some authority over food service, sewage and solid waste disposal, and other areas of prison operation that are subject to existing state regulatory laws. However, these statutes do not permit regulation of the prison operation itself, including issues related to public safety as well as the types of inmates coming into the prison. If oversight is legislated and implemented by a state regulatory agency, the regulations used for the private prison probably will have to be adopted through the state's Administrative Procedures Act.

Assuming some form of regulatory oversight is desirable, what areas of operation should a state attempt to regulate? Several suggestions were made, most of which fall under the general heading of "protection of public safety," including:

! Inmate Classification

Should a state (or local government) that hosts a private prison importing inmates from other jurisdictions regulate the type of inmates that can be housed there? In the Youngstown situation, the city, the private provider, and the sending jurisdiction all agreed that the new prison would house only "medium-custody" inmates. However, both the sending jurisdiction and the private provider failed to adhere to this commitment. The city was not in a position to monitor these placements to ensure compliance with the "medium-custody" promise. Under a revised, more detailed contract, the city now has the power to directly monitor compliance with all aspects of the contract, including provisions requiring adherence to a particular classification system.

Absent legislation or contractual agreements with a local government, there is nothing to prevent a private institution from switching from "safer" inmates to higher risk inmates, including high-custody offenders, sex offenders, or other violent offenders. One way to control this would be to prohibit inmates convicted of certain types of offenses. However, the type of offense does not necessarily indicate the level of risk associated with a particular inmate. Every prison administrator can tell stories of car thieves who turn out to be violent, disruptive inmates and murderers who become calm, stabilizing influences on a prison

population.

A more comprehensive means of controlling the types of inmates would be to limit the inmates who can enter the prison to inmates with specific security classifications. However, even this approach may have loopholes. “Medium-custody” inmates can mean different things to different people depending on one’s classification system. In different jurisdictions, the same inmate may be classified as low, medium, or high custody. Even where system standards are uniform, the system’s “override” provisions can cause variations in inmate classification.

One way for a state to control the type of inmates entering a private prison is to legislatively mandate that all such inmates meet the classification standards of the host-state’s department of corrections and then monitor actual placements to ensure compliance. The Colorado Department of Corrections (CDOC) has been given oversight authority for all the private prisons in the state whether or not state inmates are in the facility. The CDOC classification unit reviews the case of every offender who comes into the private prison to assess whether that offender can be managed at that particular institution. This entails considerable work and there may be opposition to it from the private company that has to deal with several sending-states and different classification systems.

! Emergency Response

Prison staff do not want disturbances and manage a facility to that end. But disturbances do occur and when they do, the safety of staff and inmates are at risk, as well as that of the general public. Maintaining public safety may begin with oversight of who enters the prison, but it also includes oversight of how the prison deals with emergencies—from inmate disturbances, to fires, natural disasters, employee work stoppages, and labor disputes.

Prison staff alone may not be able to control a serious emergency. Does the corporation have clear, firm agreements with local law enforcement, fire departments, and emergency services agencies for assistance? Should the corporation also have emergency assistance agreements with the state department of corrections? Initially is it preferable for an emergency response team with a corrections background to respond to an inmate disturbance rather than local law enforcement officials? Law enforcement agencies in a small community hosting a speculative prison are unlikely to have the resources or the specially trained staff to respond to a prison uprising. One of the forum participants related an event in which inmates in a private prison began a disturbance around the transfer of several hundred inmates from another state. Specially trained emergency response staff from the state department of corrections were called in to help quell the disturbance. Without this support, would the disturbance have become worse? Would the staff of the private prison alone been able to maintain control of the institution?

! Declaring and Responding to an Emergency

Who declares an emergency and calls for assistance from state or local government sources? Once outside assistance is assembled, who is in charge of the emergency response team, the private prison staff or someone from the outside? One corrections representative expressed his unwillingness to commit a state corrections emergency response team if his agency is not given complete control over the situation.

! Employee Training and Qualification Standards

Should a host-state regulate private prison employee training? Should a host-state mandate that private prison employees receive the same training as state prison employees? If training requirements are based on a state equivalency model, should the private employees have to attend the same academy as state employees? If they attend the state corrections academy, what should the charges be? Should private employees have to meet law enforcement or corrections standards for the use of firearms?

! Reporting Requirements

Must a private facility report possible criminal activity or other incidents, and, if so, when and to whom? How will a private facility cooperate with local law enforcement in criminal investigations and prosecutions? Law enforcement authorities in Youngstown were concerned that criminal activity at the private prison was not being reported to them and that the prison did not have a sound plan to deal with criminal activity.

What other information does the host-state and the local jurisdiction want from the prison? Should the private prison be required to submit copies of routine inspections by health departments or other government oversight bodies, incident reports, grievances, or other paperwork generated by prison operations?

! Release of Offenders

Inmates whose home state is a substantial distance away are not likely to stay in touch with friends and family. Having visitors from home will become a rare luxury. Other contacts with home communities through newspapers or TV may also be lost. Over a period of years, it is likely the inmate will develop more ties with the speculative prison community and, absent other requirements, may prefer to be released in that area. The sending-state might allow an inmate to be released into the host-state, rather than incurring the expense of returning the inmate. Should the host-state require that inmates transferred from other states into private prisons within the host-state are returned to their state of origin for release?

Is There an Increase in Liability for Host-States That Regulate a Spec Prison?

Will the host-state or local jurisdiction that takes on the responsibility for regulating a private

prison increase its liability exposure? As observers of inmates and the courts are well aware, some inmates are extremely litigious. When a state takes on the regulation of a private prison with out-of-state inmates, inmates in that facility can be expected to file claims against the host-state. These claims may allege that inmates have suffered injury because of failures by the host-state to discover violations of its regulations in the private prison and/or that the agency did not take proper action to correct violations. While it may be difficult to win such lawsuits, they will become a burden on the regulating jurisdiction.

Will the Host Community or Private Provider Oppose Regulation?

Forum participants from local jurisdictions with private prisons spoke warmly of the economic benefits the providers offered the community, ranging from new jobs to infrastructure improvements, to becoming positively involved in community activities. They expressed concern that state regulation could become too burdensome and discourage expansion of private correctional facilities. Local authorities may oppose regulation if they believe it threatens their economic growth.

Noting that attempts by single states to regulate speculative prisons can be frustrated by the prisons simply locating in other states with little or no regulation, some forum participants wondered whether the solution might be some form of federal regulation.

Startup Controls

Conventional wisdom regarding the opening of new prisons calls for transferring inmates gradually, giving staff and inmates time to adjust to each other, and allowing a shakedown of the physical plant. A slower startup also allows new staff an opportunity to assert themselves, gain confidence, and define the prison's operating culture. One of the major contributing causes of the disruptions in Youngstown was attributed to the prison accepting 900 inmates in three weeks.⁹

But the sending-state and the new private prison may want to transfer inmates quickly, so the sending-state may resolve its crowding issue more quickly and the private prison may get its bottom line in the black faster. One participant suggested that states could reduce the pressure on the private company to fill the facility as quickly as possible by providing a flat rate, rather than a per diem rate, for the first 6-12 months or a year.

Applicability of State Criminal Statutes

⁹ *Report to the Attorney General: Inspection and Review of the Northeast Ohio Correctional Center*, prepared by the Office of the Corrections Trustee for the District of Columbia, November 25, 1998.

Most states have criminal laws related to offenses specific to a prison/jail setting. The most obvious of these are escape statutes. Others may include laws relating to possession of contraband by a prisoner or special criminal statutes relating to assaults on correctional officers.

Most of these laws were written before private prisons began operations and pertain only to prisoners held in jails or prisons operated by units of government. Several years ago two inmates from Oregon escaped from a private prison in Texas, but could not be prosecuted for escape because Texas law did not address escape from a *private* facility.¹⁰

These problems were resolved in Idaho by adoption of a statute that says that “any offense, which if committed in a county jail or other governmental detention facility would be a crime, including escape, shall also be a crime if committed by or with regard to inmates housed in a private prison facility.”

Use of Force

State laws commonly allow correctional officers, like law enforcement officers, to use force, including deadly force, in certain situations. These laws, like escape laws, were written for the publicly operated facility. There was substantial uncertainty among forum participants regarding the extent of authority for use of force by correctional staff in a private facility. Some wondered whether existing laws regarding private security officers would provide sufficient authority. Improper use of force could expose the officers to civil as well as criminal liability.

Both receiving and sending-states should have a clear understanding of the law in the receiving state for private correctional staff to use force against inmates. Presumably, that authority should be identical to the power possessed by correctional officers employed by a public agency.

Prosecution and Sentencing

From time to time, inmates serving sentences in private prisons will be convicted of crimes. When these inmates come from another state, where will they serve their time for crimes committed in the host-state? Is the host-state required to absorb the burden of incarcerating such inmates if it prosecutes the case? Several forum participants encouraged states to adopt laws providing that out-of-state inmates convicted of crimes while incarcerated be required to serve their sentences in their state of origin. Ohio has adopted such a law, which provides that, as a condition of accepting inmates from other states, a private prison must have an agreement with the sending-states requiring that, should its inmates commit crimes while in Ohio, the sentences imposed for those crimes will, with limited exception, be served in the sending-state.

Another potentially controversial aspect of applying criminal laws of the receiving state to out-of-state inmates could arise regarding the death penalty. Participants could envision a situation

¹⁰ Abt, p. 67.

in which the host-state might seek to impose the death penalty on an inmate from a state that does not have the death penalty.

State Staff Losses to Private Prison

State departments of corrections may lose staff to private facilities and there is not much the state can do to prevent this. Generally private correctional companies pay less and provide fewer benefits than their public counterparts, at least at the line-staff level. However, moving to a new, private prison could be an attractive career change for a prison manager. One administrator indicated that, in some cases, the state benefits from this shift in staff because these individuals tend to bring the procedures they used in the state facilities to the new facility.

Organized Labor and Private Prisons

Correctional officers' unions have been among the most vocal opponents of prison privatization. They oppose the sending of inmates out of state or the development of private prisons within their state. A participant from a community in which a speculative prison is under development reported that the state correctional officers' union threatened a lawsuit to block inmates from being moved into the facility.

Another prison administrator noted that the introduction of private prisons may be a "wake-up call" for unions. The specter of privatization may give state correctional agencies a new tool for negotiating with unions to produce a more efficient, effective union workforce. With or without unions, a state's decision to use private prisons may cause a decline in morale among its existing employees.

Sending-State Issues

While the host-state worries about public safety around the private prison, the sending-state must be concerned about how its inmates are housed and treated. The sending-state is still responsible for the constitutional rights of transferred inmates. Despite these realities, some forum participants commented that sometimes a sending-state seems to take an “out of sight, out of mind” or an “it’s not our problem anymore” approach to transferred inmates. Nevertheless, there was a strong consensus that sending-states *must* monitor their placement contracts with private companies.

Several of the issues concern both the sending-state and the host-state that regulates private prisons. On some issues, the host-state and sending-state may have conflicting objectives. For instance, each state may want the correctional officers of the private prison trained to its own standards. Yet state-to-state variations in training requirements may lead to substantially different outcomes. Classification systems are another area where differences may be expected.

Perhaps the best piece of advice regarding the sending-state and the contracting process was that the state must remain in control of the process from development of a request for proposal (RFP) to selecting a potential contractor, to negotiating a contract, to monitoring contract performance. As participants pointed out, the keys to success in contracting are to develop an effective RFP, to have a sound evaluation/selection process, and to monitor, monitor, monitor.

There are several reasons that states contract with private facilities, especially those with speculative beds. Relieving crowding was the most commonly identified reason for contracting, according to a survey of agencies with privatization contracts.¹¹ The same study showed that the initiative most frequently comes from legislative or political sources, not from the department of corrections.¹² Other reasons are that the private facilities can provide a quick response to other operational emergencies (the D.C. situation) or assist the state in complying with court orders.

Transferring inmates out of state raises a basic public policy question. Is it appropriate for a state to send its inmates hundreds or thousands of miles away, for what may be long periods of time? Out-of-state placements make visits from family or friends very difficult and cut the inmate off from his/her home community almost entirely. Will the practice of sending some inmates away for extended periods of time support a subtle, long-term NIMBY (“not in my backyard”) flavor to corrections? Will states send more and more of their offenders away to avoid problems of dealing with inmates released at home? Could a state perhaps decide to have inmates released in the state where they were sent?

¹¹ Abt, p. iii.

¹² Id., p. iv.

Effects on Public Policy

The growth of speculative prisons could have considerable impact on a state's policy towards prison expansion. In the absence of speculative prison beds, a state with an overcrowded system knows it must pay a substantial up-front cost to build a new prison. It may also have difficulty finding a suitable location for a new prison, at least in an area that best fits the needs of the department of corrections. These factors, plus the ongoing cost of running the facility, may force lawmakers to consider other options to deal with the crowding, including expansion of alternatives to incarceration or changes to the state's sentencing laws.

The availability of private, speculative beds in the state or elsewhere may allow states to duck overcrowding and budgetary issues: the beds are ready and waiting and are, in a sense, "free" since they come with no large, up-front, capital price tag. In fact, these private beds may be cheaper than the state department of corrections' per diem cost, even though their cost includes the private company's capital investment and its profit margin, because they are operating new, more efficient facilities.

The availability of speculative prison beds may pre-empt any careful consideration of where the beds should be located. A prison located in a small or remote community that needs new industry may not be located well for department of corrections purposes. These prisons may have chronic problems in finding and retaining quality staff, especially professional staff and minorities. The prison may be inconvenient for inmate movement purposes. Its location may hinder visits by family and friends. Yet if a department of corrections finds itself in need of a new prison and a new prison just happens to be sitting empty somewhere in the state, will there be a thoughtful review of where the new prison should be sited? Even if the department opposes use of the facility, will politicians heed those concerns, especially if the prison is located in a district represented by a powerful legislator?

Authorizing Legislation to Send Inmates Out of State

Generally, states do not need specific legislation to contract with a private facility in that state for the housing of inmates. But is legislation necessary for a state to send its inmates to a private prison in another state? Historically, out-of-state transfers have been accomplished on a very selective basis through interstate compacts to which both the receiving and sending-states were participants. These compacts provide clear authority for the transfers and specify certain inmate rights under laws of the sending-state.

While it does not appear that a compact is necessary to transfer an inmate to a private prison, forum participants generally believed that some enabling legislation was appropriate. Does legislation that allows the transfer of inmates to out-of-state, speculative prisons simply enable or does it also define the duties of the department of corrections regarding such transfers? Should a statute authorizing a contract for services mandate minimum qualifications for the private prison company, such as experience and qualifications of management personnel, financial stability, and demonstrated ability to run a prison.

Participants recommend that states review their statutes regarding the custody of offenders. In some states the statute provides for offenders to be sentenced to the custody of the department of corrections. The department of corrections can decide whether to place the offender in a state facility or a facility in another state. In some states, the statute stipulates that offenders are to be sentenced to the custody of the department of corrections for confinement in a facility operated by the department of corrections. This provision may eliminate the use of a private facility in state or out of state.

In some states, civil service laws may prevent contracting out services. Civil service laws often contain provisions prohibiting the privatization of jobs traditionally performed by government employees.¹³ Because of this legal constraint, state civil service statutes should be researched early in the contracting process.

Cost Considerations

The Abt study examined the literature evaluating whether private prisons are cheaper to run than publicly operated prisons and concluded that the cost-saving question is still open.¹⁴ Some studies claim to show savings, albeit not dramatic ones. The Abt report notes that differences between government and private sector accounting systems make detailed, systematic comparisons difficult.¹⁵

Nonetheless, some discussion at the forum suggested that there may be dramatic cost differences between state-operated prisons in the North and private prisons in the South. One northern representative from a sending-state compared his costs of around \$55 per inmate/per day to costs of about \$40 per day in the private, southern state prison where his state was sending inmates. The meeting did not permit exploration of the reasons for these differences. However, differences of \$15 per day are likely to reflect much more than different accounting systems and may create strong pressure on northern states to begin shipping inmates south, regardless of differences in the nature of the prisons.

Participants caution states not to focus exclusively on finding the cheapest private beds to avoid sending inmates to a cheap prison that is badly run, with a poorly trained staff and little or no programming. The sending-state needs to recognize the problems of housing inmates in a basic no-program, “no-frills” prison. For instance, if medium-custody inmates return to the sending-state for a stay in a minimum-custody prison or prerelease program prior to their release, will their incarceration in a “three hots and a cot” prison impair their participation in such programs? Will the prison where the primary inmate program is enforced idleness contribute to an increase in inmate hostility and disruptive behavior?

¹³ Abt, App. 3, p. 27.

¹⁴ Abt., p. 33.

¹⁵ Id., p. 35.

Liability of Sending-State

Particularly in light of the litigious nature of many inmates, what is the liability a state may encounter in sending inmates into a private speculative prison? What effects will monitoring efforts have on such exposure?

Competition

Part of the value of privatization is that states are able to obtain services at a reasonable cost due to competition in the marketplace. Speculative prisons may compromise this competition. If a speculative prison suddenly offers its beds to a state department of corrections in need of beds and the state accepts the offer without going through a traditional request for proposal process, the cost-saving pressures of competition may be lost. The state may also lose its ability to tailor operation of the private prisons to its own needs if it starts buying prison beds “off the shelf.”

Requests for Proposals and Contracts

Writing good RFPs and contracts and negotiating favorable contracts for housing inmates in private prisons requires specialized technical expertise and experience. Drafters should be knowledgeable about correctional institution operations, correctional legal issues, private correctional issues, corporate law, and both state and federal tax law. Understanding some of the practical problems related to transferring large numbers of inmates is critical. If the contract provides for housing inmates out of state, its complexity increases.

The private companies with which an agency may be dealing may have gone through the contracting process many times. By contrast, the public agency may have no experience in contracting for the private placement of inmates. Recognizing these disparities, one participant recommended that RFP/contract development be handled by an agency attorney familiar with correctional issues instead of the agency’s procurement staff who may know little about corrections.

Agencies are encouraged to obtain outside assistance from lawyers or consultants with expertise in private prison contracting, if it does not exist in-house. While an agency lawyer may understand legal issues in corrections, he or she may be unfamiliar with the unique issues and potential problem areas in contracting. Sometimes these issues are very practical matters, such as how to set up the transfer to minimize the likelihood of disruption by the inmates. Other times, the issues may be legally complex, such as dealing with issues related to corporate structure. The agency that assigns RFP/contract negotiations to inexperienced staff risks ending up with an unfavorable contract.

A simple way for an agency to start preparing for contract development is to review what other agencies have done. While private providers may not want to divulge their contracts with other public agencies, most agencies are willing, even legally required, to provide copies of those contracts upon request. The Association of State Correctional Administrators maintains such a collection for use by its members.

A list of items to be addressed in the RFP and/or contract, discussed below, was identified during the forum. Some of these are relatively minor; others address infrequent situations, such as inmate deaths. But the more details and contingencies that are included in the contract, the less likelihood there is for surprises and controversy later. After the contract is signed, the company has no obligation to change how it operates or do anything extra unless the contract is amended.

Authority of the Provider

Does the private provider have clear and complete legal authority to operate a prison where it is located? This is the flip side to the question of whether a department of corrections has the power to contract with a private, out-of-state provider. An RFP should require demonstration of this authority.

Private Company Qualifications in Correctional Management

How long has the company been in the prison business and how many prisons does it operate? How well are its prisons run? What sort of litigation has it faced? Has it responded to emergencies? Does the company have competent central management, with strong internal auditing and quality control procedures. How much discretion is given to the heads of its various institutions and is it too much or too little?

Staff Qualifications and Experience

Will the sending-state insist upon minimal levelsof training for private prison staff and will the state correctional agency review the training program? If the prison is just opening, will the state examine staff qualifications and experience? Perhaps the sending-state should ask itself: “Would we open a new prison with staff with this level of training and experience?” If the answer is “no,” then the agency should re-examine its decision to contract. Will new staff be subject to a criminal background check? If yes, how will this be achieved, since a private business does not have access to criminal record databases?

Will a sending-state’s insistence upon minimal levels of experience for staff in a new facility conflict with a host jurisdiction’s desire (or demand) to hire its residents first, even though they may be inexperienced in working in a prison? The sending jurisdiction needs to evaluate whether the staff of the new private prison is qualified to take responsibility for the lives and safety of hundreds of the sending-state’s inmates.

Emergencies

Is the provider capable of responding to emergencies? What arrangements does the provider have with public agencies in its area (local law enforcement, fire departments, state department of corrections, etc.) to provide assistance in emergencies? Have these public agencies confirmed

that they are willing and able to provide such assistance? What are the criteria for declaring an emergency in a private prison and for initiating a call for outside assistance? Does the prospective provider have a history of working with state and local governments in emergency situations and has its performance been checked with those agencies?

Labor Disputes

Most private prisons are non-union. Is the sending-state prepared to deal with labor problems associated with using non-union vendors? Correctional employee unions have been vocal opponents of privatization. What if private employees walk out over a dispute? Or go on strike? If a state correctional agency places inmates in a private prison in another state, it may not be able to send staff to cover in the event of a labor dispute, or quickly pull its inmates out. These options will be much more difficult to execute if the prison is far away.

Inmate Access to the Courts

Inmates enjoy a constitutionally protected right of access to the courts, a right that requires prison officials to provide inmates access to law libraries or help from persons trained in the law (*Lewis v. Casey*, 116 S.Ct. 2174, 1996). Sending-states must consider how the private contract prison will meet this legal obligation. When inmates are moved out of state, retaining access to the sending-state's courts may be especially problematic as the private prison's law library is likely to have laws and court decisions from the host-state rather than the sending-state.

Several participants indicated that for out-of-state transfer contracts, they used a contract lawyer to provide assistance to inmates rather than trying to provide written legal materials for them in the facility to which they have been sent.

Inmate Deaths

The contract should address procedures to follow if an inmate dies. Will the remains be returned to the sending-state and, if so, how and at whose expense?

Inmate Grievances

Will the sending-state insist that the private prison provide administrative remedies for inmate grievances? What form should that process take? What is the role of the sending-state and the private prison in an administrative remedy process? How will the sending-state monitor inmate grievances?

Administrative remedies can alert the sending agency to developing problems. The Prison Litigation Reform Act (PLRA) requires that inmates exhaust administrative remedies before they

can bring a civil rights action against a public corrections agency. Forum participants discussed whether the PLRA applies to private prison operators.

Classification and Reclassification

Presumably the sending-state will send the appropriate classification of inmate per contract specifications. But how will it handle classification reviews and reclassifications for inmates transferred to private facilities? Most classification systems anticipate routine periodic reviews (perhaps yearly) and ad hoc reviews based on certain events, such as serious disciplinary infractions.

When the sending-state relinquishes control over the classification process, it opens the door for the provider to keep inmates who belong elsewhere or to get rid of inmates who should remain. Permitting private facility staff to prepare the paperwork for classification decisions may give them too much influence over the reclassification process.

Access to Parole Boards or Other Releasing Authorities

If an inmate has the right to appear before a parole board or other releasing authority, how will the inmate exercise that right if he or she is out of the state? The Interstate Compact on Corrections addresses this situation: “Any hearing or hearings to which an inmate confined under this compact may be entitled by the laws of the sending-state may be had before the appropriate authorities of the sending-state or of the receiving state if authorized by the sending-state.”¹⁶

Using the parole board in a receiving state to conduct a hearing is generally not possible under a private contract arrangement, because the parole board in the receiving state would not be party to the contract, nor have any obligation under state law to conduct hearings for inmates from other states.

Visitation

With out-of-state transfers, it may be virtually impossible for family and friends to visit an inmate except on very rare occasions. Should the sending agency try to address this, perhaps by developing a video exchange program?

¹⁶ Revised Code of Washington §72.74.020.

Financial Emergencies

A private prison could go bankrupt or start to cut services because of financial difficulties. State correctional agencies need to find ways to monitor the financial strength of the company and to anticipate a private prison's financial crises. The Abt report suggests that bankruptcy concerns are exaggerated, but that a state may protect itself through contractual provisions that require the corporation to notify the government of an impending bankruptcy before a petition is filed, as well as termination clauses in the contract and proper monitoring of the company's financial situation.¹⁷ In any case, the sending-state must anticipate bankruptcy or other financial difficulties through contractual means and thorough monitoring of the company at the corporate level.

Bonds

To some degree an agency can protect itself against financial problems with the provider by requiring the provider to post bonds to cover various contingencies. Although bonds provide financial protection, they will not supply staff for the operational assistance necessary to protect the health and safety of inmates. Sending-states need to consider how they will respond if the private prison suddenly lost much of its workforce.

Contract Enforcement

If termination is the only sanction for failing to meet contractual requirements, enforcing compliance with minor contract breaches may be difficult for the sending-state. For a state correctional agency to terminate its private prison contract, it must scramble to find beds for its inmates and then arrange to transport the inmates to the new facility. This is a cumbersome and expensive process for other than very serious breaches of contract. States cannot afford to terminate the contract for minor disagreements.

Several persons suggested that the contract include a range of enforcement alternatives, including monetary sanctions. The legislation in Ohio mandates that contracts between a private contractor and a local community include a schedule of fines for noncompliance with contract requirements.¹⁸ A sending-state should consider similar provisions.

¹⁷ Abt, p. 40 et seq.

¹⁸ Ohio Revised Code §009.07(D)(17).

Court Orders

In many jurisdictions, inmates are protected by one or more court orders. Usually these orders pertain to inmates in a particular institution, but in some circumstances, the requirements of the orders may follow the inmates wherever they go. This issue should be clarified before a contract is signed because it may dictate the terms of the contract.

“Subject to Legislative Appropriation” Clause

Contractual language that a state’s continuing obligations under a contract are subject to legislative appropriation may give an agency an easy out of an unsatisfactory contract.

Indemnification

Is the private provider required to indemnify the sending-state against liability and for foreseeable emergency costs, such as having to relocate all the inmates in the event of a prison shutdown? Is the provider able to demonstrate its financial ability to meet the costs of such indemnification through such means as insurance or bonds?

Inmate Transport

How will hundreds of inmates be moved to a private prison initially? How will future comings and goings of inmates be handled, particularly since these will often involve only one or two inmates? If private personnel are used, do they have clear legal authority to transport across state lines, to use force, and to carry firearms? If ground transportation is used, where will inmates sleep en route?

Inmate Reactions to an Out-of-State Transfer

Generally inmates will not be happy about being uprooted from one prison and transported to another facility hundreds or thousands of miles away. The unhappier inmates become, the more likely they are to be disruptive. Inmates who think they can reverse the decision by being disruptive will act out. This was the case with the private prison in Youngstown, as many of the District of Columbia inmates had found they could undo earlier transfers to other prisons by creating disruptions.¹⁹ Agencies should recognize that when one inmate is transferred to a less desirable prison, he may be unhappy but he is relatively alone in his unhappiness. When several hundred inmates are transferred virtually *en masse*, they embody a block of discontent that may be difficult to handle.

¹⁹ *Report to the Attorney General: Inspection and Review of the Northeast Ohio Correctional Center*, prepared by the Office of the Corrections Trustee for the District of Columbia, November 25, 1998.

Agencies preparing to transfer inmates (or preparing to receive them) should try to minimize disruption for the inmates. The following are issues that should be addressed:

- # **Property handling** - How will inmates' property be handled? Will inmates be able to take their belongings with them? Are the property regulations between sending and receiving prisons different? Can property differences be resolved?
- # **Requesting volunteers** - Can the agency call for volunteers who are willing to be transferred to a new facility?
- # **Advance notice** - Will advance notice be given to inmates so that they can get ready, notify family, etc.? Will advance notice cause more problems than it solves?
- # **Family notification** - Does the agency have a plan for notifying families of the transfer and of responding to questions families will continue to have about the inmate? What provisions does the contract contain for the private prison to respond to requests from family members?
- # **Record transfers** - Are complete records transferred along with the inmate, especially medical records?
- # **Equal treatment** - To what extent is there equality of treatment between the sending and receiving prisons regarding access to programs, types of programs, copay requirements, smoking, quality of food, property allowances, work opportunities, and pay for work?

Seemingly minor transfer issues may cause immediate problems. For instance, one participant spoke of an inmate who was terrified of flying, yet the transport plan called for inmates to fly to their new prison.

Prison Culture Issues

Different prisons have different "cultures." Is the prison run with a rigid, heavy emphasis on custody and control, or does it balance programs and custody? Are staff encouraged to interact with inmates and to answer inmate questions? Is an inmate who asks "Why?" apt to find himself face down on the ground and soon headed for segregation?

In theory, the culture of a prison is established by the management and staff of the prison, but in fact, inmates also affect the culture of a prison, especially if not managed by the staff. Gang involvement in prisons has become a very serious problem in many institutions across the country. An assessment of gang activity is a very important consideration in the decision to contract.

Cultural differences between prison systems show up in how they respond to operational issues. Sending-state participants spoke of concerns that some private prisons tended to downplay inmate problems that the sending jurisdiction would consider serious. Law enforcement officials in Youngstown were concerned that crimes committed by inmates were not reported and that the prison did not have a sound policy regarding the reporting of suspected criminal activity.

Establishing the cultural environment of a new prison can involve competition between staff and inmates for control. When a new prison opens its doors for the first time to several hundred inmates from another jurisdiction, those inmates import their own culture. Cultural solidarity among the inmates can make it more difficult for new staff, especially inexperienced staff, to get the institution up and running smoothly.

Does a sending-state's assessment of a potential private prison include a review of the culture of the facility, and if so, is that culture consistent with the overall philosophy and mission of the sending department of corrections?

Startup Problems

Opening a new prison is best done gradually, a few inmates at a time. This allows new staff to become accustomed to dealing with inmates and to the physical layout of the prison. Prison staff are able to set a tone for operations and create the model for the culture of the institution. Gradual startups also allow for the discovery of "bugs" in a new prison when they can be dealt with more effectively and with less risk. Competent administrators try to avoid putting inexperienced staff in a "sink or swim" situation with a large population of convicts.

Despite this standard practice, some agencies seem to forget how to go slowly when dealing with private providers. They allow large numbers of inmates to be transferred into a new prison in a relatively short period of time. The result is that a very inexperienced staff is suddenly flooded with a large number of inmates who may be extremely unhappy about being transferred.

A sending jurisdiction may see a prison full of empty beds as a quick fix for its crowding problems, while the private facility may see a rosier bottom line by taking a lot of inmates quickly. The result is that both public and private agencies may act more quickly than is good for the staff and inmates in the prison.

The dilemma between startup time and cash flow for a private prison may be alleviated by a reimbursement scheme with a flat-rate reimbursement for the startup period, followed by payment on an inmate per diem basis. Of course, the sending-state may see this as an extra expense, which is inconsistent with its goal of transferring inmates quickly at a reasonable cost.

Monitoring

Forum participants indicated that a sending-state's greatest concern is monitoring the contract for assurance that the private provider is meeting contract requirements. Monitoring conditions is the responsibility of the sending-state and it is different from a host-state's interest in regulating the private prison. All too often monitoring gets lip service. Practical experience shows that sometimes the sending-state relaxes its standards and may ignore inmate problems or fail to address emerging problems with contract compliance. The following are monitoring issues identified by forum participants:

What should be monitored?

The criteria by which a sending-state will monitor a private prison should appear in the contract. When new or unanticipated issues arise within a department of corrections, the head of the agency can usually address them simply by announcing and implementing a change in operating policy. This unilateral power to change direction is not possible in a contractual arrangement. Unless a sending-state identifies conditions of performance and incorporates them in the contract, it will be unable to impose those conditions on the contractor, absent a modification of the contract. Anticipating every contingency is difficult, especially in the beginning. In specifying monitoring criteria, objective measures should be used wherever possible. State negotiators should consider including performance-based criteria in the contract.

Who should do the monitoring?

Participants suggested that monitors could be employees of the sending-state's department of corrections, consultants retained by the sending-state, or representatives of the host-state through a contract with the sending-state.

Participants from several states have full-time monitors on site, constantly reviewing documents, inspecting the facility, and talking with inmates. Others questioned whether onsite monitors would be co-opted by the institution they are monitoring and whether they have the range of skills to monitor all the different oversight areas. Other states send monitors into facilities at frequent intervals. In this model, monitors review certain documents off site (grievances, disciplinary reports, incident reports, etc.). Periodically, they schedule an in-depth, onsite audit (perhaps by a multidisciplinary team) as well as unannounced onsite inspections as necessary. Participants were unanimous in their opinion that monitors need complete access to a facility at all times of day and night.

Full-time onsite monitors are probably not feasible for states sending small numbers of inmates. One small state that transfers a small number of inmates out of state shares monitoring expenses with other jurisdictions.

How will the quality of monitoring be evaluated?

Having a monitoring system in place does not necessarily ensure the quality of the system. As mentioned above, several participants expressed concern about full-time onsite monitors becoming co-opted by the facility they are supposed to be monitoring.

If the host-state has accepted responsibility for monitoring on behalf of the sending-state, can the sending-state be certain of its quality? One forum participant was critical of a state agency charged with monitoring private facilities, saying “No one ever flunks their audits.” Court-appointed monitors, who have functioned in many states, may be able to suggest effective models for monitoring.

What monitoring documents should be delivered to a sending-state?

Desk reviews of paperwork in key areas can provide valuable monitoring information, including incident reports, disciplinary reports, inmate grievances, routine health and sanitary inspections, and medical services usage.

Should a sending-state demand to see documents relating to inmates from other states who are housed in the private prison? Evaluating information in those documents may indicate areas of operational concern.

How should facilities with inmates from multiple states be monitored?

Monitoring may become confusing if a private prison is trying to serve several sending jurisdictions, each with different contractual requirements and monitoring techniques, in addition to regulation from the host-state/community. To get a complete picture of what is happening at the prison, the sending-state needs to monitor the complete operation, not just what happens to its inmates. Does this mean the sending-state should review paperwork related to other state’s inmates? Is there value in considering joint monitoring with other customers of the private prison? Will inmates from different states have different levels of privileges and will this become a source of tension among inmate groups?

How well does the state monitor itself?

The question here is: “Does the sending- or host-state evaluate its own correctional operations as closely and hold itself as accountable as the private provider?”

Conflicting Regulatory Requirements

Where both a sending-state and host-state(or local jurisdiction) are actively monitoring/regulating a private prison, conflicts are possible between the variousregulating agencies. Does the sending-state know the private prison's local regulations? How will the sending-state deal with conflicts between its own and other requirements? Will regulation by other agencies affect the sending-state's oversight?

Exploitation of Inmate Labor

Inmates traditionally perform a wide variety of maintenance and upkeep tasks at a prison for little or no pay. A private prison may expect to use inmates in similar ways. The sending-state is responsible for monitoring inmate work requirements to ensure that inmates are not exploited in order to cut the private facility's costs and enhance its bottom line.

Inmates from Multiple States

As the spec prison movement grows, private prisons are beginning to house inmates from several different jurisdictions. This can present unique issues of concern to each of the sending-states.

If a private prison has only one state customer, ensuring that appropriate population levels are maintained is not difficult. However, if the institution houses inmates from several jurisdictions, absent contractual provisions, there is nothing to prevent the private company from crowding the facility to make more money.

Will the sending-state monitorthe types of inmates the prison is accepting from other states? Will it learn in advance of sudden influxes of inmates from other states? Will it hear if the prison is expanding the number of customer states? One participant recalled how tensions increased when his department sent a large number of white inmates to a prison that already housed a substantial number of black inmates. He indicated that both groups were fearful and distrustful of the other.

Organized Labor

Organized labor in a sending-state probably will opposethe decision to send inmates to a privately operated, non-union prison. Some states have laws prohibiting the contracting out of jobs traditionally performed by state civil service employees. Employee unions may attempt to use these laws to bar the use of private prisons, either in or out of state.

Contractual Arrangements and Corporate Restructuring

While the simplest model of a privatization contract is one between a department of corrections and a private prison company operating a prison, sometimes the contractual arrangements are more complex. It is not uncommon for the transfer to be accomplished via an intergovernmental agreement between the sending department of corrections and a unit of local government that owns the institution where inmates are to be housed. The unit of local government does not operate the prison, but has contracted with a private company for operation. In a more complicated variation of this scenario, a local jurisdiction might have access to the facility through a contract with the private owner of the facility, which, in turn, contracts with another corporation for operation.

From the perspective of the sending-state, the intergovernmental agreement may allow the state to avoid legal requirements that apply to a contract with a private provider, including limitations on privatization, bidding requirements, etc. But this contracting process may leave the sending-state one legal step removed from the real operator of the facility in contract negotiations, monitoring, and enforcement. Does a compliance issue have to be raised with the unit of local government, which, in turn, contacts and deals with the provider? How much priority will a unit of local government give to enforcing concerns of the sending jurisdiction, especially if they might have negative economic consequences for the private provider and the local community? The sending-state's key interest is in having direct contractual arrangements with the service provider, not with an intermediary.

Other corporate issues relate to mergers and reorganizations. A private prison company with whom a state contracts may be purchased by another larger company. Will the new company be able to address the concerns of the governmental entities tied to the operation of a prison, including the local government jurisdictions in which the facility is located, the host-state, and the sending-state?

Consider the dealings between a local jurisdiction and a private company over the past several years. The city's first contract was with CCA, a Delaware corporation, and covered the transfer of property to the company for a prison site, construction, and eventual operation of the prison. Later CCA-Delaware was acquired by Corrections Corporation of America, a Tennessee corporation. CCA-Tennessee built the prison in the city and then it conveyed the land on which the prison sat and the prison itself to CCA Prison Realty Trust, a Maryland real estate investment trust. Later, the Correctional Management Services Corporation, acquired certain operating assets and liabilities of CCA-Tennessee and Prison Realty Corporation. The current contract is with Correctional Management Services Corporation.

What happens if Correctional Management Services Corporation decides the state's new regulatory scheme is too demanding and moves or sells its prison to another prison company? Although these organizational changes may have little effect on the operation of the prison, government agencies that sign contracts or oversee regulations at private prisons must anticipate and assess the impact of corporate restructuring and changes in ownership.

Assessing the Effectiveness of Privatization

Although privatization has established a strong foothold in American corrections since its beginning in 1983, stakeholders still debate the value of contracting for prison services. Are the services really cheaper? Are they better? What makes a successful contracting experience? Contracting agencies should evaluate their private prison contracts fairly and include evaluation requirements in the development of the contract.

Conclusion

Prisons have been a growth industry for more than 20 years. In the last 15 years, that growth has included the private sector. The most recent addition to private sector corrections is the “spec prison.” Because a speculative prison can locate almost anywhere and draw its inmates from states throughout the country, state governments cannot ignore them. But, do they want speculative prisons in their state and, if so, how they will regulate them? Other states that already use speculative prisons are struggling with how to monitor their inmates long distance.

This brief identifies some of the operational and legal issues raised by speculative prisons for local communities, host-states, and sending-states. Addressing and developing thoughtful responses to the issues raised within these pages should help states make sound policy decisions regarding the speculative prison movement.

Appendix A

Privately Operated Speculative Correctional Facilities and Public Safety

A Checklist of Issues

Privately Operated Speculative Correctional Facilities and Public Safety

A Checklist of Issues

The following is a checklist of issues related to private, speculative prisons that were identified by correctional and other state and local policymakers who participated in the Forum on Privately Operated Speculative Correctional Facilities and Public Safety in March 1999. The forum was sponsored by the Office of Justice Programs' Corrections Program Office in the U.S. Department of Justice.

This checklist is provided as a quick reference for public policymakers at the state and local levels to help ensure that the issues identified as important by forum participants are considered when entering into a relationship with a private, speculative prison. It is divided into three sections:

- # **Local Community Issues** - issues of concern to local officials who are entering into an agreement with a private company to build a spec prison in their community
- # **Host-State Issues** - issues of concern to state officials who have or anticipate a spec prison(s) to be built in their state which will house inmates from other states
- # **Sending-State Issues** - issues of concern to state or local officials who are entering into an agreement with a private company to house their inmates in a spec prison within their state or in another state

The checklist is offered as a tool to help focus the thinking of state and local government officials faced with the prospect of either having a private company build a speculative prison in their state or community or of sending state inmates to a spec prison. The checklist is not meant to be a complete list of every issue that may need to be addressed, but to provide a starting point for the local identification of issues that must be addressed given the circumstances of the venture.

Private, Speculative Prison Checklist

Local Community Issues

G What are the economic benefits associated with a private prison?

- ☐ New direct jobs
- ☐ New indirect jobs (support businesses, restaurants, etc.)
- ☐ Increased taxes from prison
- ☐ Increased taxes from new employees
- ☐ Other

G Is a new prison a good long term investment?

G What are the costs to the municipality and county?

- ☐ Increased criminal justice system demands from criminal activity in the prison - law enforcement, prosecution, court appointed counsel, court time, etc.
- ☐ Potential increase in emergency costs related to disturbances, fires, etc. at the prison
- ☐ Increased demand on civil courts
- ☐ Expansion of infrastructure - roads, water and sewage, solid waste, schools, etc.
- ☐ Other

G What is the expected impact on local law enforcement and emergency services?

- ☐ Criminal investigations
- ☐ Direct or backup assistance in event of inmate disturbance
- ☐ Fire and emergency responses for disturbances, fires, etc.

G Should the private provider be required to reimburse municipality and/or county for increased governmental costs associated with its development?

- ☐ Developmental costs (e.g., new roads, water system, etc.)
- ☐ Cost of services (e.g., increased demands on criminal justice system)

G What financial incentives, if any, should be provided to attract the private prison to the community?

G What level of political influence will the private prison have on public policy decisions of municipality?

G Does the unit of government have the technical expertise in-house to develop and negotiate an RFP and contract or are out-side resources needed to ensure favorable results?

- ☐ From Department of Corrections
- ☐ Private consultant, familiar with operation of private prisons
- ☐ Economic development specialist

G What level of regulatory control and oversight over operation of prison will the local government(s) exercise?

G What is the goal of regulation?

- ☐ Public safety
- ☐ Other

G What areas of operation will be regulated and what standards/criteria will be used?

- ☐ Types of inmates admitted
 - ☐ Classification used by prison
 - ☐ Demand prison follow host-state's classification system
 - ☐ Ban certain types of inmates
 - ☐ Other
- ☐ Emergency response capability
- ☐ Access to institution records, inspections
- ☐ Reporting to local law enforcement
- ☐ Local law enforcement access for purposes of investigating any suspected criminal activity?
- ☐ Evaluation of internal and perimeter security
- ☐ Staffing numbers and patterns
- ☐ Staff qualifications and training
- ☐ Criminal background checks of staff

- ☐ Staff training
 - ☐ Content and quality
 - ☐ Amount of training
 - ☐ Same as for state correctional agency staff
 - ☐ Meet state firearms certification requirements
- ☐ Inmates released procedures
- ☐ Insurance protection
- ☐ Other

G Will regulation increase municipality's liability exposure?

G How will facility be monitored?

- ☐ Municipal employee
- ☐ Contract consultant
- ☐ State correctional agency

G How will regulation be accomplished?

- ☐ Local ordinance
- ☐ Contract with provider

G What role will the state play in regulation of the prison, and how will that be coordinated with local regulation and oversight?

G Will aggressive local regulation discourage company from locating prison in the community?

G What economic and political pressures could affect the ability or will to effectively monitor the prison and enforce contract requirements?

G Other issues of concern

Private, Speculative Prison Checklist

Host-State Issues

- G Should a host-state regulate private prisons within its boundaries?**
- G Should regulatory authority granted to state agencies be mandatory or discretionary?**
- G If private prisons are to be regulated, what body should do the regulation?**
- ☐ Local governments
 - ☐ State Department of Corrections
 - ☐ Other state agency
- G What resources will the regulatory agency need to fulfill its monitoring responsibilities?**
- G What aspects of private prison operation should be regulated?**
- ☐ Inmate classification
 - ☐ Emergency response procedures and agreements
 - ☐ Employee training and qualification standards
 - ☐ Reporting requirements
 - ☐ Release of offenders
- G What level of access will the monitors have to the facility (scheduled visits, unscheduled visits, 24 hour access)?**
- G Will the private company be charged for costs associated with regulation and oversight, and, if so, how?**
- ☐ Per diem assessment on inmates
 - ☐ Per diem plus bill for extraordinary expenses
 - ☐ Bill for actual expenses

G Will regulation of a private prison increase the liability exposure of the state?

G What economic and political pressures could affect the ability or will to effectively monitor the prison and enforce contract requirements?

G Is the facility be required to become accredited by a national or state accrediting organization?

- ☐ American Correctional Association
- ☐ National Commission on Correctional Health Care
- ☐ Other

G What is the prison's emergency response capability?

- ☐ Role of local law enforcement/emergency services
- ☐ Role of state law enforcement/corrections
- ☐ Agreements with state/local agencies for emergency support

G Who declares an emergency?

G Who commands emergency support responses?

- ☐ Does government official take control of prison operations during emergency, directing private employees
- ☐ Do state/local government officials take direction from representative of private company

G Who pays for emergency support services from state/local government?

G How well trained are the prison staff and what training resources are available?

- ☐ Attend state corrections academy
- ☐ Will state regulate quality/content of training
- ☐ Supervisory employee training
- ☐ Continuing training

G What reports is the private company required to submit to the host-state?

- ☐ Criminal activity reports
- ☐ Incidents reports
- ☐ Grievances
- ☐ Disciplinary reports
- ☐ Internal inspections
- ☐ Other

G Who should receive reports and when are they due?

G Are there restrictions on where out-of-state offenders may be released?

G Do the state's laws adequately address issues related to private prisons?

- ☐ Escape laws
- ☐ Criminal activity by inmates unique to the prison setting (e.g., assaulting a *correctional* officer, possession of contraband, etc.)
- ☐ Use of force, including lethal force, by private correctional officers
- ☐ Other

G What is the response of organized labor to entry of private prisons into the state?

Private, Speculative Prison Checklist

Sending State Issues

G What are the reasons for contracting for the out-of-state placement of inmates in private prisons?

- ☐ Prison crowding not amenable to in-state solution
- ☐ Operational emergencies demanding “immediate” new prison beds
- ☐ Compliance with court orders
- ☐ Other

G What are the short- and long-term correctional public policy implications of reliance on speculative prison beds?

- ☐ Less likely to explore alternatives to confinement for offenders who do not pose a threat to public safety
- ☐ Gradually lead to more out of state placements to avoid new in-state prison construction
- ☐ Lack of adequate programming for inmates in out-of-state facilities
- ☐ Poor location for attracting quality staff
- ☐ Poor location in relation to other department of corrections facilities, increasing transportation costs

G Does the department of corrections have statutory authority to place inmates in a private facility and/or to transfer inmates to out-of-state facilities?

- ☐ State law authorize the department of corrections to contract with private provider to house inmates, especially if the inmates are to be sent out of state
- ☐ State civil service laws prevent or inhibit the use of private prison

G Does enabling legislation include minimum qualifications private provider must meet?

- ☐ Experience of management personnel
- ☐ Financial strength of company
- ☐ Demonstrated ability to run a prison
- ☐ Other

G Is cost reduction a factor in the decision to contract for beds and have cost comparisons been done which factor in the costs of transporting inmates, monitoring, etc.?

G What is the state's liability exposure related to the use of a private prison?

G Are all operational issues clearly defined in the RFP/contract (Note: this *is not* an exhaustive list of contract issues)?

- ☐ Authority of the private company to operate a prison facility
- ☐ Private company's qualifications in correctional management
- ☐ Staff qualifications and experience
- ☐ Emergency response capability
- ☐ Contingencies during labor disputes
- ☐ Inmate access to the courts
- ☐ Procedures related to inmate deaths
- ☐ Procedures for inmate grievances
- ☐ Classification and reclassification procedures
- ☐ Access to parole boards and other releasing authorities
- ☐ Visitation procedures

G Does the contract include provisions to enable the state terminate the contract for convenience of the state and to enforcement the conditions of the contract?

- ☐ Termination clause
- ☐ Sanctions less than termination
- ☐ Schedule of financial penalties, linked to seriousness of contract violation
- ☐ Contract includes "subject to legislative appropriation of funds" clause.

G How will inmates be transported between the state facility to the private facility?

- ☐ Plane
- ☐ Ground transportation
- ☐ Accommodations while in route

G Who will be responsible for transporting the inmates between facilities and, if the private company does it have the authority and qualifications to safely transport inmates?

G Have procedures been established to facilitate the orderly and least disruptive transfer of inmates and their records/belongings?

- ☐ Property handling
- ☐ Requests for volunteers
- ☐ Advance notice
- ☐ Family notification
- ☐ Records transfer
- ☐ Equal treatment considerations
- ☐ Other

G What is the prison culture in the private facility and is it consistent with that in the state facilities?

- ☐ Comparison of emphases on custody and control
- ☐ Program comparisons, quality and quantity
- ☐ Staff relations with inmates
- ☐ Who "runs" the prison, staff or inmates?
- ☐ Inmate groups and gangs
- ☐ Levels of violence and use of force

G Has the state established a mechanism and procedures to monitor the contract to ensure that the private provider is meeting the requirement?

G What types of documents will be sent to the state to facilitate contract monitoring?

- ☐ Incident reports
- ☐ Disciplinary reports
- ☐ Inmate grievances
- ☐ Routine health and sanitary inspection reports
- ☐ Medical services usage reports

G Does the facility house inmates from other states and how will this impact the safety of and services provides to the sending-state's inmates?

G Do state operated facilities meet the same standards that are being imposed on the private provider?

G What are the department of correction's plans/abilities to respond to an immediate need to remove inmates from the private facility in event of a sudden contract termination or emergency?

- ☐ Alternative beds available
- ☐ Method of transportation
- ☐ Other

G If the private facility is new, what provisions have been made to facilitate a smooth transition to full operation?

- ☐ Gradual transfer of inmates
- ☐ Reimbursement adjustments to ease financial burden on corporation of slow startup
- ☐ Increased monitoring
- ☐ Technical support and training from the department of corrections

G What is the response of organized labor to the transfer of state inmates to a private prison?

G How will the state monitor the financial health of the private corporation and protect itself in the case of a corporate restructuring?

G How will the state assess the effectiveness of privatization?

Appendix B

Ohio Revised Code Section 009.07

Ohio Revised Code Section 009.07

Effective Date: 03/17/98

(A) As used in this section:

(1) "Deadly weapon" has the same meaning as in section 2923.11 of the Revised Code.

(2) "Governing authority of a local public entity" means whichever of the following is applicable:

For a county, the board of county commissioners of the county;

For a municipal corporation, the legislative authority of the municipal corporation;

(a) For a combination of counties, a combination of municipal corporations, or a combination of one or more counties and one or more municipal corporations, all boards of county commissioners and legislative authorities of all of the counties and municipal corporations that combined to form a local public entity for purposes of this section.

(3) "Local public entity" means a county, a municipal corporation, a combination of counties, a combination of municipal corporations, or a combination of one or more counties and one or more municipal corporations.

(4) "Non-contracting political subdivision" means any political subdivision to which all of the following apply:

(a) A correctional facility for the housing of out-of-state prisoners in this state is or will be located in the political subdivision.

(b) The correctional facility described in division (A)(4)(a) of this section is being operated and managed, or will be operated and managed, by a local public entity or a private contractor pursuant to a contract entered into prior to the effective date of this section 17, 1998, or a contract entered into on or after the effective date of this section 17, 1998, under this section.

(c) The political subdivision is not a party to the contract described in division (A)(4)(b) of this section for the management and operation of the correctional facility.

(5) "Out-of-state jurisdiction" means the United States, any state other than this state and any political subdivision or other jurisdiction located in a state other than this state.

(6) "Out-of-state prisoner" means a person who is convicted of a crime in another state or under the laws of the United States or who is found under the laws of another state or of the United States to be a delinquent child or the substantially equivalent designation.

(7) "Private contractor" means either of the following:

(a) A person who, on or after the effective date of this section 17, 1998, enters into a contract under this section with a local public entity to operate and manage a correctional facility in this state for out-of-state prisoners.

(b) A person who, pursuant to a contract with a local public entity entered into prior to the effective date of this section 17, 1998, operates and manages on the effective date of this section 17, 1998, a correctional facility in this state for housing out-of-state prisoners.

(B) Subject to division (I) of this section, the only entities other than this state that are authorized to operate a correctional facility to house out-of-state prisoners in this state are a local public entity that operates a correctional facility pursuant to this section or a private contractor that operates a correctional facility pursuant to this section under a contract with a local public entity.

Subject to division (I) of this section, a private entity may operate a correctional facility in this state for the housing of out-of-state prisoners only if the private entity is a private contractor that enters into a contract that comports with division (D) of this section with a local public entity for the management and operation of the correctional facility.

(C) (1) Except as provided in this division, on and after the effective date of this section 17, 1998, a local public entity shall not enter into a contract with an out-of-state jurisdiction to house out-of-state prisoners in a correctional facility in this state. On and after the effective date of this section 17, 1998, a local public entity may enter into a contract with an out-of-state jurisdiction to house out-of-state prisoners in a correctional facility in this state only if the local public entity and the out-of-state jurisdiction with which the local public entity intends to contract jointly submit to the department of rehabilitation and correction a statement that certifies the correctional facility's intended use, intended prisoner population and custody level and the department reviews and comments upon the plans for the design or renovation of the correctional facility regarding their suitability for the intended prisoner population specified in the submitted statement.

(2) If a local public entity and an out-of-state jurisdiction enter into a contract to house out-of-state prisoners in a correctional facility in this state as authorized under division (C)(1) of this section, in addition to any other provisions it contains, the contract shall include whichever of the following provisions is applicable:

(a) If a private contractor will operate the facility in question pursuant to a contract entered into in accordance with division (D) of this section, a requirement that, if the facility is closed or ceases to operate for any reason and if the conversion plan described in division (D)(16) of this section is not complied with, the out-of-state jurisdiction will be responsible for housing and transporting the prisoners who are in the facility at the time it is closed or ceases to operate and for the cost of so housing and transporting those prisoners;

(b) If a private contractor will not operate the facility in question pursuant to a contract entered into in accordance with division (D) of this section, a conversion plan that will be followed if, for any reason, the facility is closed or ceases to operate. The

conversion plan shall include, but is not limited to, provisions that specify whether the local public entity or the out-of-state jurisdiction will be responsible for housing and transporting the prisoners who are in the facility at the time it is closed or ceases to operate and for the cost of so housing and transporting those prisoners.

(3) If a local public entity and an out-of-state jurisdiction intend to enter into a contract to house out-of-state prisoners in a correctional facility in this state as authorized under division (C)(1) of this section, or if a local public entity and a private contractor intend to enter into a contract pursuant to division (D) of this section for the private contractor's management and operation of a correctional facility in this state to house out-of-state prisoners, prior to entering into the contract the local public entity and the out-of-state jurisdiction, or the local public entity and the private contractor, whichever is applicable, shall conduct a public hearing in accordance with this division and, prior to entering into the contract, the governing authority of the local public entity in which the facility is or will be located shall authorize the location and operation of the facility. The hearing shall be conducted at a location within the municipal corporation or township in which the facility is or will be located. At least one week prior to conducting the hearing, the local public entity and the out-of-state jurisdiction or private contractor with the duty to conduct the hearing shall cause notice of the date, time and place of the hearing to be made by publication in the newspaper with the largest general circulation in the county in which the municipal corporation or township is located. The notice shall be of a sufficient size that it covers at least one-quarter of a page of the newspaper in which it is published. This division applies to a private contractor that, pursuant to the requirement set forth in division (I) of this section, is required to enter into a contract under division (D) of this section.

(D) Subject to division (I) of this section, on and after the effective date of this section 17, 1998, if a local public entity enters into a contract with a private contractor for the management and operation of a correctional facility in this state to house out-of-state prisoners, the contract, at a minimum, shall include all of the following provisions:

(1) A requirement that the private contractor seek and obtain accreditation from the American correctional association for the correctional facility within two years after accepting the first out-of-state prisoner at the correctional facility under the contract and that it maintain that accreditation for the term of the contract;

(2) A requirement that the private contractor comply with all applicable laws, rules, or regulations of the government of this state, political subdivisions of this state and the United States, including, but not limited to, all sanitation, food service, safety and health regulations;

(3) A requirement that the private contractor send copies of reports of inspections completed by appropriate authorities regarding compliance with laws, rules and regulations of the type described in division (D)(2) of this section to the director of rehabilitation and correction or the director's designee and to the governing authority of the local public entity in which the correctional facility is located;

(4) A requirement that the private contractor report to the local law enforcement agencies with jurisdiction over the place at which the correctional facility is located, for investigation, all criminal offenses or delinquent acts that are committed in or on the grounds of, or other-

wise in connection with, the correctional facility and report to the department of rehabilitation and correction all escapes from or disturbances at the facility;

(5) A requirement that the private contractor provide a written report to the director of rehabilitation and correction or the director's designee and to the governing authority of the local public entity in which the correctional facility is located of all unusual incidents occurring at the correctional facility. The private contractor shall report the incidents in accordance with the incident reporting rules that, at the time of the incident, are applicable to state correctional facilities for similar incidents occurring at state correctional facilities.

(6) A requirement that the private contractor provide internal and perimeter security to protect the public, staff members of the correctional facility and prisoners in the correctional facility;

(7) A requirement that the correctional facility be staffed at all times with a staffing pattern that is adequate to ensure supervision of inmates and maintenance of security within the correctional facility and to provide for appropriate programs, transportation, security and other operational needs. In determining security needs for the correctional facility, the private contractor and the contract requirements shall fully take into account all relevant factors, including, but not limited to, the proximity of the facility to neighborhoods and schools.

(8) A requirement that the private contractor provide an adequate policy of insurance that satisfies the requirements set forth in division (D) of section 009.06 of the Revised Code regarding contractors who operate and manage a facility under that section and that the private contractor indemnify and hold harmless the state, its officers, agents and employees and any local public entity in the state with jurisdiction over the place at which the correctional facility is located or that owns the correctional facility, reimburse the state for its costs in defending the state or any of its officers, agents, or employees and reimburse any local government entity of that nature for its costs in defending the local government entity, in the manner described in division (D) of that section regarding contractors who operate and manage a facility under that section;

(9) A requirement that the private contractor develop a security classification schedule for prisoners housed in the correctional facility, classify in accordance with the schedule each prisoner housed in the facility and house all prisoners in the facility in accordance with their classification under this division;

(10) A requirement that the private contractor will not accept for housing and will not house, in the correctional facility any out-of-state prisoner in relation to whom either of the following applies:

(a) The private entity has not obtained from the out-of-state jurisdiction that imposed the sentence or sanction under which the prisoner will be confined in this state a copy of the institutional record of the prisoner while previously confined in that out-of-state jurisdiction or a statement that the prisoner previously has not been confined in that out-of-state jurisdiction and a copy of all medical records pertaining to that prisoner that are in the possession of the out-of-state jurisdiction.

(b) The prisoner, while confined in any out-of-state jurisdiction, has a record of institutional violence involving the use of a deadly weapon and a pattern of committing acts of an assaultive nature against employees of, or visitors to, the place of confinement or has a record of escape or attempted escape from secure custody.

(11) A requirement that the private contractor, prior to housing any out-of-state prisoner in the correctional facility under the contract, enter into a written agreement with the department of rehabilitation and correction that sets forth a plan and procedure that will be used to coordinate law enforcement activities of state law enforcement agencies and of local law enforcement agencies with jurisdiction over the place at which the facility is located in response to any riot, rebellion, escape, insurrection, or other emergency occurring inside or outside the facility;

(12) A requirement that the private contractor cooperate with the correctional institution inspection committee in the committee's performance of its duties under section 103.73 of the Revised Code and provide the committee, its subcommittees and its staff members, in performing those duties, with access to the correctional facility as described in that section;

(13) A requirement that the private contractor permit any peace officer who serves a law enforcement agency with jurisdiction over the place at which the correctional facility is located to enter into the facility to investigate any criminal offense or delinquent act that allegedly has been committed in or on the grounds of, or otherwise in connection with, the facility;

(14) A requirement that the private contractor will not employ any person at the correctional facility until after the private contractor has submitted to the bureau of criminal identification and investigation, on a form prescribed by the superintendent of the bureau, a request that the bureau conduct a criminal records check of the person and a requirement that the private contractor will not employ any person at the facility if the records check or other information possessed by the contractor indicates that the person previously has engaged in malfeasance;

(15) A requirement that the private contractor will not accept for housing and will not house, in the correctional facility any out-of-state prisoner unless the private contractor and the out-of-state jurisdiction that imposed the sentence for which the prisoner is to be confined agree that, if the out-of-state prisoner is confined in the facility in this state, commits a criminal offense while confined in the facility, is convicted of or pleads guilty to that offense and is sentenced to a term of confinement for that offense but is not sentenced to death for that offense, the private contractor and the out-of-state jurisdiction will do all of the following:

(a) Unless section 5120.50 of the Revised Code does not apply in relation to the offense the prisoner committed while confined in this state and the term of confinement imposed for that offense, the out-of-state jurisdiction will accept the prisoner pursuant to that section for service of that term of confinement and for any period of time remaining under the sentence for which the prisoner was confined in the facility in this state, the out-of-state jurisdiction will confine the prisoner pursuant to that section for that term and that remaining period of time and the private contractor will transport the prisoner to the out-of-state jurisdiction for service of that term and that remaining period of time.

(b) If section 5120.50 of the Revised Code does not apply in relation to the offense the prisoner committed while confined in this state and the term of confinement imposed for that offense, the prisoner shall be returned to the out-of-state jurisdiction or its private contractor for completion of the period of time remaining under the out-of-state sentence for which the prisoner was confined in the facility in this state before starting service of the term of confinement imposed for the offense committed while confined in this state, the out-of-state jurisdiction or its private contractor will confine the prisoner for that remaining period of time and will transport the prisoner outside of this state for service of that remaining period of time and, if the prisoner is confined in this state in a facility operated by the department of rehabilitation and correction, the private contractor will be financially responsible for reimbursing the department at the per diem cost of confinement for the duration of that incarceration, with the amount of the reimbursement so paid to be deposited in the department's prisoner programs fund.

(16) A requirement that the private contractor, prior to housing any out-of-state prisoner in the correctional facility under the contract, enter into an agreement with the local public entity that sets forth a conversion plan that will be followed if, for any reason, the facility is closed or ceases to operate. The conversion plan shall include, but is not limited to, provisions that specify whether the private contractor, the local public entity, or the out-of-state jurisdictions that imposed the sentences for which the out-of-state prisoners are confined in the facility will be responsible for housing and transporting the prisoners who are in the facility at the time it is closed or ceases to operate and for the cost of so housing and transporting those prisoners.

(17) A schedule of fines that the local public entity shall impose upon the private contractor if the private contractor fails to perform its contractual duties and a requirement that, if the private contractor fails to perform its contractual duties, the local public entity shall impose a fine on the private contractor from the schedule of fines and, in addition to the fine, may exercise any other rights it has under the contract. Division (F)(2) of this section applies regarding a fine described in this division.

(18) A requirement that the private contractor adopt and use in the correctional facility the drug testing and treatment program that the department of rehabilitation and correction uses for inmates in state correctional institutions.

(E) A private correctional officer or other designated employee of a private contractor that operates a correctional facility that houses out-of-state prisoners in this state under a contract entered into prior to, on, or after the effective date of this section 17, 1998, may carry and use firearms in the course of the officer's or employee's employment only if the officer or employee is certified as having satisfactorily completed an approved training program designed to qualify persons for positions as special police officers, security guards, or persons otherwise privately employed in a police capacity, as described in division (A) of section 109.78 of the Revised Code.

(F) (1) Upon notification by the private contractor of an escape from, or of a disturbance at, a correctional facility that is operated by a private contractor under a contract entered into prior to, on, or after the effective date of this section 17, 1998 and that houses out-of-state prisoners in this state, the department of rehabilitation and correction and state and local law

enforcement agencies shall use all reasonable means to recapture persons who escaped from the facility or quell any disturbance at the facility, in accordance with the plan and procedure included in the written agreement entered into under division (D)(11) of this section in relation to contracts entered into on or after the effective date of this section 17, 1998 and in accordance with their normal procedures in relation to contracts entered into prior to the effective date of this section 17, 1998. Any cost incurred by this state or a political subdivision of this state relating to the apprehension of a person who escaped from the facility, to the quelling of a disturbance at the facility, or to the investigation or prosecution as described in division (G)(2) of this section of any offense relating to the escape or disturbance shall be chargeable to and borne by the private contractor. The contractor also shall reimburse the state or its political subdivisions for all reasonable costs incurred relating to the temporary detention of a person who escaped from the facility, following the person's recapture.

(2) If a private contractor that, on or after the effective date of this section 17, 1998, enters into a contract under this section with a local public entity for the operation of a correctional facility that houses out-of-state prisoners fails to perform its contractual duties, the local public entity shall impose upon the private contractor a fine from the schedule of fines included in the contract and may exercise any other rights it has under the contract. A fine imposed under this division shall be paid to the local public entity that enters into the contract and the local public entity shall deposit the money so paid into its treasury to the credit of the fund used to pay for community policing. If a fine is imposed under this division, the local public entity may reduce the payment owed to the private contractor pursuant to any invoice in the amount of the fine.

(3) If a private contractor, on or after the effective date of this section 17, 1998, enters into a contract under this section with a local public entity for the operation of a correctional facility that houses out-of-state prisoners in this state, the private contractor shall comply with the insurance, indemnification, hold harmless and cost reimbursement provisions described in division (D)(8) of this section.

(G) (1) Any act or omission that would be a criminal offense or a delinquent act if committed at a state correctional institution or at a jail, workhouse, prison, or other correctional facility operated by this state or by any political subdivision or group of political subdivisions of this state shall be a criminal offense or delinquent act if committed by or with regard to any out-of-state prisoner who is housed at any correctional facility operated by a private contractor in this state pursuant to a contract entered into prior to, on, or after the effective date of this section 17, 1998.

(2) If any political subdivision of this state experiences any cost in the investigation or prosecution of an offense committed by an out-of-state prisoner housed in a correctional facility operated by a private contractor in this state pursuant to a contract entered into prior to, on, or after the effective date of this section 17, 1998, the private contractor shall reimburse the political subdivision for the costs so experienced.

(3) (a) Except as otherwise provided in this division, the state and any officer or employee, as defined in section 109.36 of the Revised Code, of the state is not liable in damages in a civil action for any injury, death, or loss to person or property that allegedly arises from, or is related to, the establishment, management, or operation of

a correctional facility to house out-of-state prisoners in this state pursuant to a contract between a local public entity and an out-of-state jurisdiction, a local public entity and a private contractor, or a private contractor and an out-of-state jurisdiction that was entered into prior to the effective date of this section 17, 1998, or that is entered into on or after the effective date of this section 17, 1998, in accordance with its provisions. The immunity provided in this division does not apply regarding an act or omission of an officer or employee, as defined in section 109.36 of the Revised Code, of the state that is manifestly outside the scope of the officer's or employee's official responsibilities or regarding an act or omission of the state, or of an officer or employee, as so defined, of the state that is undertaken with malicious purpose, in bad faith, or in a wanton or reckless manner.

(b) Except as otherwise provided in this division, a non-contracting political subdivision and any employee, as defined in section 2744.01 of the Revised Code, of a non-contracting political subdivision is not liable in damages in a civil action for any injury, death, or loss to person or property that allegedly arises from, or is related to, the establishment, management, or operation of a correctional facility to house out-of-state prisoners in this state pursuant to a contract between a local public entity other than the non-contracting political subdivision and an out-of-state jurisdiction, a local public entity other than the non-contracting political subdivision and a private contractor, or a private contractor and an out-of-state jurisdiction that was entered into prior to the effective date of this section 17, 1998, or that is entered into on or after the effective date of this section 17, 1998, in accordance with its provisions. The immunity provided in this division does not apply regarding an act or omission of an employee, as defined in section 2744.01 of the Revised Code, of a non-contracting political subdivision that is manifestly outside the scope of the employee's employment or official responsibilities or regarding an act or omission of a non-contracting political subdivision or an employee, as so defined, of a non-contracting political subdivision that is undertaken with malicious purpose, in bad faith, or in a wanton or reckless manner.

(c) Divisions (G)(3)(a) and (b) of this section do not affect any immunity or defense that the state and its officers and employees or a non-contracting political subdivision and its employees may be entitled to under another section of the Revised Code or the common law of this state, including, but not limited to, section 009.86 or Chapter 2744. of the Revised Code.

- (H) (1) Upon the completion of an out-of-state prisoner's term of detention at a correctional facility operated by a private contractor in this state pursuant to a contract entered into prior to, on, or after the effective date of this section 17, 1998, the operator of the correctional facility shall transport the prisoner to the out-of-state jurisdiction that imposed the sentence for which the prisoner was confined before it releases the prisoner from its custody.
- (2) No private contractor that operates and manages a correctional facility housing out-of-state prisoners in this state pursuant to a contract entered into prior to, on, or after the effective date of this section 17, 1998, shall fail to comply with division (H)(1) of this section.
- (3) Whoever violates division (H)(2) of this section is guilty of a misdemeanor of the first degree.

(I) Except as otherwise provided in this division, the provisions of divisions (A) to (H) of this section apply in relation to any correctional facility operated by a private contractor in this state to house out-of-state prisoners, regardless of whether the facility is operated pursuant to a contract entered into prior to, on, or after the effective date of this section 17, 1998. Division (C)(1) of this section shall not apply in relation to any correctional facility for housing out-of-state prisoners in this state that is operated by a private contractor under a contract entered into with a local public entity prior to the effective date of this section 17, 1998. If a private contractor operates a correctional facility in this state for the housing of out-of-state prisoners under a contract entered into with a local public entity prior to the effective date of this section 17, 1998, no later than one hundred eighty days after the effective date of this section 17, 1998, the private contractor shall enter into a contract with the local public entity that comports to the requirements and criteria of division (D) of this section.